

# From legal to political constitutionalism?

**VB** [verfassungsblog.de/from-legal-to-political-constitutionalism/](http://verfassungsblog.de/from-legal-to-political-constitutionalism/)

Paul Blokker So 4 Jun 2017

So 4 Jun  
2017

While the developments in Poland and in Hungary clearly have to do with a move away from legal constitutionalism, I am not so sure about their moving towards a form of political constitutionalism, as prof. Adam Czarnota suggests. In my view, a key dimension of political constitutionalism is the observation that specific constitutional norms and rights are ultimately ‘essentially contestable’ as reasonable disagreement is an intrinsic part of democracy. Therefore, the understanding and interpretation of such norms and rights ought to remain part of an on-going political debate, rather than being one-sidedly interpreted by the judiciary. Such an open and inclusionary political debate ought to take place within the limits of the constitution, as a basic framework for resolving disagreements. And it ought to be grounded in the ideas of *audi alteram partem* and the equal weight of different views in the debate.

I am not convinced that such an open and inclusionary debate is currently taking place in Poland (or in Hungary for that matter). The protagonists of what prof. Lech Morawski identifies as a ‘republican’ view of constitutionalism seem not to be searching for an open, inclusive debate on final values and rights interpretations, but rather interested in imposing their own specific understanding of Polish history and tradition – emphasizing conservative and religious ideas -, claiming this to be a majoritarian view in Polish society. There is little recognition of the ‘essentially contestable’ nature of such values and rights, and of the ‘irreducible plurality’ of existing society. Instead, the Polish government promotes a ‘[partisan constitution](#)’, de facto denouncing alternative views raised by opposition forces as undermining Polish tradition and society.

It is hard to see how a partisan constitution still upholds important liberal values, individual freedom, a notion of the rule of law, and constitutionalism, if there is a systematic attempt to silence opponents (including the Constitutional Tribunal), and if it equates the temporary political majority the government obtained in the general elections, with a permanent, structural majority in Polish society.

Rather than republican or political constitutionalism, I believe labels such as communitarian constitutionalism, or even constitutional nationalism or [populism](#), are more applicable to the Polish governmental project. While Prof. Morawski approvingly refers to Michael Sandel, Philip Pettit, and Quentin Skinner as writing in the republican tradition, it remains unclear how the central (competing) notions in the republican debate – self-mastery and non-domination- are reflected in his understanding of republicanism. In the debate on republicanism in political theory, the emphasis is either on individual self-realization or self-mastery through political participation or on non-domination, meaning that an individual citizen’s freedom depends on not being subject to arbitrary rule.<sup>1)</sup>R. Bellamy (2008), ‘Republicanism, Democracy, and Constitutionalism’, in C. Laborde and J. Maynor (eds), *Republicanism and Political Theory*, Blackwell, 159-89.

The individualist focus of republican theory seems less important in prof. Morawski’s account, in which the collective is rather emphasized. Indeed, his understanding of Polish republicanism endorses values such as patriotism, solidarity, a strong state, and a prominent role of religion in public life, whereas there is no mention of the importance of the individual contribution to collective self-rule or of the avoidance of subjecting individuals to arbitrary rule. Instead, the main connecting point between theoretical republicanism and the Polish version seems to be the insistence on a political, rather than a legal form of constitutionalism. This becomes clear from the emphasis on the Polish tradition of parliamentary supremacy that particularly emerged in the second half of the 18th century, and is now invoked to emphasize a distinctive Polish tradition and constitutional identity that should be respected by the EU.

Such an emphasis on constitutional tradition and identity is closer to a communitarian understanding of

constitutionalism. In the communitarian perception, the community and its identity are paramount. The constitution itself is less important than the pre-political values and history of the community that the constitution reflects, and the integrative and symbolic function of the constitution is stressed.<sup>2)</sup>Cf. P. Blokker (2010), *Multiple Democracies in Europe. Political Culture in New Member States*, Routledge, pp. 77-80. The emphasis is on safeguarding the political sovereignty of a specific national group.

The project of a Fourth Republic has been in the making for some time,<sup>3)</sup>Cf. Blokker 2010: 94-5. and the current project of PiS clearly continues similar ideas. The compromise of the 1997 Constitution – itself the outcome of a protracted and conflictive debate<sup>4)</sup>Cf. R. A. Brier, *Politics of Meaning. Culture and Constitution-Drafting in Poland's Third Republic*. Diss. unpublished PhD-thesis, Frankfurt (Oder): European University Viadrina, 2006. – has always been contested by PiS. Rather than understanding the constitution as a framework based on a wider societal consensus, PiS attempts to bend constitutional rules and values to its own religious, conservative views, which may be held by an important part of the Polish society, as prof. Morawski claims, but cannot convincingly be portrayed as based on a society-wide consensus. The populist figure of the People is conjured, in which the pure People are defended against both internal and external enemies. The current government's project is ostensibly based on 'the right of Poles to preserve their national identity and political and economic sovereignty', implying a distinctive interpretation of such national identity, while denying alternative views.

In an earlier analysis of the democratic crises in countries such as Hungary and Romania,<sup>5)</sup>P. Blokker (2013), *New democracies in crisis? A comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge. to which Poland can now be added, I claimed that an intrinsic problem of legal constitutionalism in the post-communist transformations has been its tendency to isolate constitutional questions from the wider public. In this, legal constitutionalism failed to stimulate societal learning regarding constitutional norms and values, as well as the emergence of civic empowerment and self-government through constitutionalism. In my view, a democratically more promising direction is civic constitutionalism, a in some ways more radical understanding of political constitutionalism (perhaps pointing into a similar direction as prof. Czarnota's call for more radical change). Civic constitutionalism values a variety of forms of citizen interaction, at various stages, with the Constitution. The current constitutional projects in Hungary and Poland are in my view, however, understanding constitutionalism in a different and highly problematic manner.

## References [ + ]

1. ↑ R. Bellamy (2008), 'Republicanism, Democracy, and Constitutionalism', in C. Laborde and J. Maynor (eds), *Republicanism and Political Theory*, Blackwell, 159-89.
2. ↑ Cf. P. Blokker (2010), *Multiple Democracies in Europe. Political Culture in New Member States*, Routledge, pp. 77-80.
3. ↑ Cf. Blokker 2010: 94-5.
4. ↑ Cf. R. A. Brier, *Politics of Meaning. Culture and Constitution-Drafting in Poland's Third Republic*. Diss. unpublished PhD-thesis, Frankfurt (Oder): European University Viadrina, 2006.
5. ↑ P. Blokker (2013), *New democracies in crisis? A comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge.

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Blokker, Paul: *From legal to political constitutionalism?*, *VerfBlog*, 2017/6/04, <http://verfassungsblog.de/from-legal-to-political-constitutionalism/>, DOI: <https://dx.doi.org/10.17176/20170604-190459>.